Supreme Court of the United States

OCTOBER TERM—1961

No. 172

OVE GUSTAVSSON CONTRACTING CO., INC.,

Petitioner,

against

FRANKLIN G. FLOETE, as Administrator of General Services Administration, MICHAEL BRENNAN, individually and as Contracting Officer of General Services Administration, and WILLIAM A. BOYD,

Respondents.

PETITIONER'S REPLY

ANTHONY B. CATALDO,
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Liberty is taken to submit this reply in order to clarify petitioner's points which appear to have been blurred by the government's brief in opposition.

At page 5 of its brief the government states that the district court treated the motion as one for summary judgment. This is not the case. The district court treated the motion as one to dismiss. It said (187 F. Supp. 839) at page 839: "The defendants move to dismiss the complaint for failure to state a claim upon which relief may be granted." At page 840, the district court clarified the second cause of action, which is the cause under consideration by this court, as charging the defendant for a personal tort saying: "The gravamen of this claim is that these defendants tortiously caused the termination of the contract. This second claim is against the active tort feasors individually". Further, on the same page, the district court identifies defendants' motion respecting this second cause of action as one to dismiss, saying, "Left for consideration is defendants' motion to dismiss the second claim in the

complaint". Then on page 841, the court said: "The motion to dismiss the second claim is granted." The notice of motion itself states that the defendants' motion was to dismiss the complaint under Rule 12 (b) (6) for the failure to state facts from which relief might be granted. The Court of Appeals, however, treated the matter as a motion for summary judgment. Appellant complained in its petition for a rehearing at pages 6-8 of that petition, that that court was in error in treating of the motion as one for summary judgment, when the district court had not, but to no avail. The importance in the different treatment of the motions is that under the motion to dismiss, the court is bound to recognize an issue of fact as defeasible of the motion, whereas under the motion for summary judgment, the court may go on to considering whether the issue is a triable issue or not. However, the parties must be given the opportunity to be heard on a motion for summary judgment, which means at least, an opportunity to produce facts by affidavits. No such opportunity was given petitioner. The notice of motion served specifically called it a motion to dismiss. The motion was treated as such by the defendants themselves and by the district court. The plaintiff did not attempt to marshal its evidentiary facts when opposing the motion. It did not have to do so. The defendants filed short affidavits which have been printed in full as an appendix to the petition to this court, in which they state the conclusory fact that what they did they did in the line of duty. In answer, plaintiff put in an affidavit by its attorney who drafted the complaint stating that it was the intent of the pleader to state a cause of action for damages for a personal tort against Brennan and Boyd, as individuals. Plaintiff's president also stated, in a short affidavit filed in support of plaintiff's motion to sever and to remand, that the second cause of action complains of a personal tort of the defendants, arguing of defendant's conduct, that its "birth and genesis was the collective minds of the defendants". The pertinent parts of these short affidavits are printed at pages 5a and 6a of appel-

lant's appendix filed in the Court of Appeals. Hence, plaintiff did not treat the defendants' motion as one for summary judgment, either. Consequently, the Court of Appeals ought not to have so treated the motion, for doing so, deprived plaintiff of the right to have submitted the full evidentiary facts of the plaintiff's case. These facts would show that defendants had threatened plaintiff with financial bankruptcy by reporting a default and notifying the plaintiff's bonding company that plaintiff had defaulted, which was not so, but, nevertheless, the report had the effect of cutting off plaintiff from ever qualifying again for government work. Plaintiff would also have offered an affidavit from a supplier of material that Boyd had boasted to him that he would break plaintiff. The facts of the progress of the work would also have been gathered and the nature of the complaint by Boyd and Brennan to their Washington superior would have been contrasted to the government's field inspectors' reports of the progress of the work, to show, at least, that the defendants' reports to their superior were untruthful. Also, there would be shown that the timing of the cancellation and of the report of cancellation to the surety and the defendants' decisions made to seize plaintiff's tools, equipment and materials and to re-let the contract under conditions which outrageously disregarded the plaintiff's rights in the part of the work done and in the materials at the job-site were a part of the scheme of these defendants to bankrupt plaintiff. The defendants' motives for acting so anti-plaintiff, rather than pro-government would also have been explained. As in all these cases, there was a personality clash between the principals. These facts could only lead to the conclusion that in interfering with the contract, the defendants acted in their own interest, to gratify their own desire to harm and injure plaintiff by ruining it financially, which is in effect, corporate murder.

Consequently, the action of the Court of Appeals in treating this motion as one for summary judgment with-

out giving plaintiff an opportunity to adduce these facts, is violative of plaintiff's right to due process of law. Furthermore, when the Court of Appeals stated that the district court had properly held that the defendants were entitled to summary judgment because officials of the Federal Government are not personally liable for alleged torts based upon acts done within the scope of their duties, it made a finding of fact upon a disputed issue of fact, upon the wrongful assumption, that the district court had treated the motion as one for summary judgment and had found in favor of defendants' contentions, that their actions were within the scope of their duties and against the plaintiff's contention, that such actions were intended by them to bankrupt plaintiff and not to report a default, which was a personal act and not an act within the scope of their duties. The purpose for doing an act is a separate fact from the act itself, and if the purpose for the doing of an act is in dispute, an issue of fact arises. Stated another way, defendants' intentions or scheme or plan is a question of fact. The plaintiff charged in its complaint that that purpose or intent was a personal desire to harm and injure plaintiff. The defendants, without denying this allegation, merely averred the generality that what they did, they did in the line of duty. Thus, a question of fact was presented. As on a motion to dismiss, the court is limited to finding whether a question of fact was presented by the complaint, and as such a finding is present the motion should have been denied. On a motion for summary judgment, the court could have gone on to consider if the question was a triable issue but there was no opportunity given to plaintiff to adduce all the facts possible on this question. Consequently, the treatment of the motion as one for summary judgment also was error.

Deciding whether the question of fact raised was sufficient to warrant the grant of relief to plaintiff is a question of law. Plaintiff cites the law of New York which appears to be that plaintiff may recover for the tort complained

of. The defendants do not contest this law. They say, however, that immunity of a government employee from suit bars the recovery. As one of the conditions to the grant of immunity is that the official must be acting within the scope of his duties, and as that issue is in dispute in this case, that issue cannot be decided on motion as it was, in favor of the defendants. This point of error is also blurred by the government brief in opposition, for again at page 5 thereof, the brief flatly rests its reliance upon the statement, "The Court of Appeals affirmed on the ground that Federal officers are immuned from civil actions based upon acts performed within the scope of their duties and which necessarily involve the exercise of judgment and discretion." Yet, the Court of Appeals did not attempt to recognize that the plain fact that whether defendants were acting within the scope of their authority was in dispute. It disregarded plaintiff's allegations of personal tort. Just as the Court of Appeals did before it, the government's brief takes it for granted that the defendants were acting within the scope of their authority. There is neither proof of that fact considered to support that conclusion, nor are there any denials of the allegations of the complaint that defendants were acting in their own interest. Consequently, it was error to disregard the dispute and it was error to hold that immunity applied, without first finding upon sufficient uncontroverted evidence that the defendants were acting within the scope of their duties.

The government likewise repeats the error of the Court of Appeals in the reading of Judge Hand's decision in *Gregoire* v. *Biddle*. The Court of Appeals adopted Judge Hand's explanation of the scope of immunity as support for its own finding that defendants had acted within the scope of their duties in this case. In other words, Judge Hand first found that the defendants were government officers entitled to immunity and then explained that absolute immunity applied to all their actions within the

scope of their employment. He said these acts are included, regardless of the plaintiff's charge that the defendants had acted out of spite. In the case at bar, without first determining that defendants were such officers as would qualify for the government's immunity, the Court of Appeals used Judge Hand's definition of the scope of immunity to find that defendants' actions were within the scope of their duties and to disregard the plaintiff's charge (which must be accepted as true) of personal motives in the misuse of their office. The Court of Appeals indulged in a pure case of confusing cause for effect in the case at bar.

The balance of the government's brief is given over to developing this combination of inferences and even introducing a new one. By calling the defendants' report to their Washington superior an internal agency report, on cue, no doubt, from the recent libel cases where this court has allowed the defense of privilege to stand, and seizing upon the court's finding that defendants were acting within the scope of their authority, the government freely argues that no review is necessary in this court. Ignored is the difference between this case and libel cases. Here, the tort is an invasion of private property and not a mere slander or libel. Also ignored is the fact that the tort in this case is based not alone upon the so-called internal agency report, but it is also based upon the malicious scheme or plan of bankrupting plaintiff by using their offices in various ways, to further said scheme, as by the timing of the cancellation, by arbitrarily seizing plaintiff's tools and equipment, by interfering with plaintiff's performance of the work, by reletting the contract upon terms which would confiscate and destroy plaintiff's right and interest in the work completed and in the unused materials on hand and in many other ways, which are here stated for the first time because their statement had not been necessary until now that it has become necessary to state the nature of plaintiff's defense to a defendants' motion for summary judg-

ment. This is the first opportunity that plaintiff has had to reveal the nature of its proof of its cause of action for damages for the personal tort of malicious interference with the contract of the plaintiff. And, they are here stated only in the most general terms because the intent is only to indicate to this court that the defense is more than a formal defense so that the error of the court in depriving petitioner of the opportunity of presenting the defense can be shown to be a grave and prejudicial error, as being violative of petitioner's constitutional right of due process as set forth in the Fifth Amendment (Pet. 4) of the United States Constitution.

Conclusion

In conclusion, it is respectfully submitted that this court should review the decision below because of the far reaching effect of the grant of absolute immunity from suit to federal employees upon the mere conclusory claim that what they did they did in the line of duty. Of course, this is not to say that the other questions presented by the petition need not be considered, but the overriding problem is as stated here and that has been pointed up by the nature of the opposition which is being offered by the government which appears to go so far as to say that the courts are precluded from examining into the scope of the agents' claim of authority, which is not so. See the decision in this court in *Howard* v. *Lyons*, 360 U. S. 593, at page 597, where this court said that such an inquiry is a proper inquiry for the courts.

WHEREFORE, petitioner respectfully prays that the petition for certiorari be granted.

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